STATE OF MICHIGAN

IN THE SUPREME COURT

DEAN ALTOBELLI,

Plaintiff/Appellee/Cross-Appellant

v

MICHAEL W. HARTMANN, MICHAEL P. COAKLEY, ANNA M. MAIURI, JOSEPH M. FAZIO, DOUGLAS M. KILBOURNE, JOHN D. LESLIE, and JEROME R. WATSON,

Defendants/Appellants/Cross-Appellees.
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Supreme Court No. 150656

Court of Appeals No. 313470

Ingham County Circuit Court Case No. 12-635-CZ

PLAINTIFF/CROSS-APPELLANT'S REPLY BRIEF IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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INTRODUCTION

This case presents a fundamental question: How does one determine whether a person is or is not an owner of a limited liability company in Michigan? The Court of Appeals ruled that there is uncertainty about whether Mr. Altobelli was wrongfully deprived of his ownership interest in the firm and that his status as an owner will require years of litigation and a trial to resolve. The Court of Appeals arrived at this conclusion after ruling that the provision in Michigan's Limited Liability Company Act (LLCA) that governs withdrawal from a LLC, MCL 450.4509, does not provide a definitive answer to the question of whether Mr. Altobelli voluntarily withdrew his ownership interest. This ruling should be reviewed by this Court because it undermines bright-line rules of law governing ownership in a LLC and it introduces uncertainty into an area of law that demands both certainty and predictability.

The Michigan Legislature wrote MCL 450.4509 in such a way as to achieve that certainty and predictability and to provide procedural protections for an owner's property rights in a LLC. The Michigan Legislature wrote MCL 450.4509 to ensure that there would not be years-long disputes as to a person's ownership interest in a LLC. That legislative design has been seriously undermined by the Court of Appeals ruling in this case.

The significant problem created by the Court of Appeals decision - and the reason why this Court should review its interpretation of MCL 450.4509 - is aptly captured in a single, seemingly innocuous sentence in defendants' response. The factual section of defendants' response begins with the following statement: "Miller Canfield will briefly describe Plaintiff's actions *that led the Firm's Managers to conclude* that he had resigned." Defs' Brf., at 2 (emphasis added). This statement reflects defendants' fundamental position that any time a LLC's managers are subjectively "led to conclude" that a member has withdrawn, they may

unilaterally declare an end to that member's ownership status, even where the member expressly informs the managers that he or she is unwilling to withdraw voluntarily as Mr. Altobelli did here.

As this case aptly demonstrates, this subjective standard for voluntary withdrawal is a recipe for disagreement and litigation as one side takes the position that a member's conduct was sufficient to lead them to believe that the member had withdrawn, while that member denies voluntarily withdrawing. But this is not the system of voluntary withdrawal from a LLC that the Michigan Legislature established when it enacted MCL 450.4509.

A change in ownership is one of the most important events in the life of a LLC and its members. There is nothing more fundamental to the governance of LLC's or to the rights and responsibilities of members in such LLC's than a member's ownership status in such an entity and the safeguards for the property rights that come with an owner's investments in a LLC. Limited liability companies have become the most popular business form in Michigan. See Exhibit 4 attached, Michigan Statistics on New Business Entities 2002 – 2014. Their use as the preferred form of doing business is steadily increasing while the use of traditional corporations has steadily decreased. The statistics strikingly show the potential impact of the Court of Appeals published decision and the importance that MCL 450.4509 be given a proper interpretation by this Court.

THE FACTS

Mr. Altobelli's application presents a purely legal question to the Court. Nonetheless, Mr. Altobelli is compelled to briefly respond to defendants' rendition of the facts and their suggestion that they somehow believed that he willingly gave away his ownership interest in Miller Canfield.[1]

Mr. Altobelli spent nearly two decades investing in the firm as one of its most productive attorneys.[2] Defendants knew that Mr. Altobelli spent about 400 hours in June and July 2010 preserving all of his client business at the firm, they knew that he arranged to maintain his practice while spending time in Alabama and, if necessary, volunteering at Alabama. Defendants knew that Mr. Altobelli projected his time at Alabama as temporary, a matter of months. [3] Defendants also knew that on July 20, 2010, Mr. Altobelli submitted a 12 page statement describing the contributions he planned to continue making during the 2011 evaluation year. They knew Mr. Altobelli's hours and revenue contributions in 2010 already constituted the full time practice of law by standards historically accepted by the firm, and they knew he would more than fulfill his obligations over the two year 2010-2011 evaluation cycle used at the firm. They also knew he was continuing to contribute at the time they cut off his ownership rights, including the 10 hours he devoted to preserving his business at the firm on the very day they deprived him of his ownership interest.

Each of the managers received Mr. Altobelli's email communications rejecting Mr. Hartmann's request to submit a written resignation. In these emails, Mr. Altobelli

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1 For the real facts, see Mr. Altobelli's redacted first affidavit of record attached here as Exhibit 5. An un-redacted version is Exhibit 1 in Plaintiff's Court of Appeals Appendix of Sealed Exhibits.

2 Mr. Altobelli consistently produced billable hours and total hours that were in the top ten of the firm's equity Principal ranks. For the 2010 evaluation year, Mr. Altobelli contributed more working revenues than 80% of the firm's owners, number 12 out of 105 equity Principals in working fee contributions and number 6 in total quality hours. Mr. Altobelli billed more hours than all of his peers during the 7 year stretch before he was voted in as an equity owner, and as an owner he contributed about 500 hours per year above the average in total hours. As an owner in 2009 and 2010, he originated substantially more business than many of his peers at the firm.

3 Contrary to defendants' slanted suggestions, Mr. Altobelli has spent more time at Alabama than he ever expected because defendants unlawfully cut off his ownership rights and efforts to restore them in 2010 and 2011 failed. Mr. Altobelli has been forced to fight this legal battle to remedy the harm and he continues to be deprived of his ownership rights to this day.

unequivocally indicated that he was unwilling to withdraw voluntarily, and he demanded a vote of the owners on any attempt to terminate his ownership position. Each of the defendants received Mr. Altobelli's email informing them that they lacked authority to terminate his ownership, and each of them knew that under the Operating Agreement's expulsion provisions they needed to persuade about 70 of the other 100 plus owners that Mr. Altobelli's ownership should be terminated. Defendants chose not to hold an expulsion vote and they elected to conceal from the owners Mr. Altobelli's repeated demands for a vote.

ARGUMENT

I. DEFENDANTS COMPLETELY AVOID ANY ANALYSIS OF THE TEXT OF MCL 450.4509 BECAUSE THE PLAIN LANGUAGE OF THE STATUTE DEFEATS THEIR ARGUMENTS.

The issue that Mr. Altobelli raises in his application is one of statutory interpretation. MCL 450.4509 covers the subject of withdrawal from a LLC and provides:

> (1) A member may withdraw from a limited liability company only as provided in an operating agreement. A member withdrawing pursuant to an operating agreement may become entitled to a withdrawal distribution as described in section 305.
>
> (2) An operating agreement may provide for the expulsion of a member or for other events the occurrence of which will result in a person ceasing to be a member of the limited liability company.

In their response, defendants applaud the Court of Appeals for its "common sense" approach to this statute (Defs' Brf., at 8) and they proclaim that it applied "familiar principles" of statutory interpretation (Def's Brf. at 2) in arriving at its interpretation of §509(1). What the defendants completely avoid, however, is any analysis of the actual text of this statute.

Subsection (1) of §509 provides for voluntary withdrawal from an LLC "only as provided in an operating agreement." Parroting the reasoning of the Court of Appeals, defendants maintain that this language in §509(1) merely "says that members may voluntarily withdraw

only when the operating agreement says withdrawal is permitted." Defs' Brf, at 8. Thus, like the Court of Appeals, defendants offer the view that the first sentence of §509(1) reads: "A member may withdraw from a limited liability company *if* provided in an operating agreement."

But, that is not what the Legislature actually wrote in §509(1). That statute does not say that a member may withdraw *if* provided in a LLC's operating agreement. Rather, it says that a member may withdraw only *as* provided in an operating agreement.

In his application, Mr. Altobelli provided a textual, grammatical and contextual analysis to show that the phrase "as provided in an operating agreement" means by a method or procedure provided in an operating agreement. It bears repeating that in §509 the word "as" operates as a subordinating conjunction and when used as a conjunction "as" means "in the way or manner that", it does not mean "if." Merriam-Webster's Collegiate Dictionary, 11th ed (2014). "Way," in turn, means "method of accomplishing" and "manner" means "a mode of procedure." *Id*. Therefore, the phrase "as provided in an operating agreement" means by a method or procedure provided in an operating agreement.[4]

Defendants' had an opportunity in their response to explain how it is that "as provided in an operating agreement" means precisely the same thing as "if provided in an operating

[4]In his application, Mr. Altobelli noted that his interpretation of §509(1) is also supported by the doctrine of *noscitur a sociis*. Plaintiff's Brf, at 16-18. Defendants are notably silent in response to this argument. Defendants instead offer legislative history which is particularly un-illuminating on the meaning of the "as provided in an operating agreement" language in §509. This is so because the "as provided" language originated in the 1993 version of §509 whereas defendants cite legislative history as to the 1997 amendments to the LLCA. Defendants, nevertheless, glean from the 1997 amendments a general legislative intent to infuse "flexibility" into LLC's and they would have the Court believe that this means that the 1997 amendments made voluntary withdrawal from a LLC easier. On the subject of voluntary withdrawal, however, it is obvious that the 1997 amendments were designed to *limit* the "flexibility" to withdraw because the amendments deleted the written notice procedure from §509. The legislative history states that "[t]he amendments restrict the ability of a member to withdraw from an LLC…[b]ecause of concern that the unrestricted right to withdraw might cause harm and instability to an LLC..." See Defs' Exhibit 4 at p 4.

agreement." They did not even attempt to do so because the text of the statute directly contradicts their position. Like the Court of Appeals, they are content with rewriting the statute to obtain a result they prefer.

The Legislature, however, required that a method or process be followed to effectuate a voluntary withdrawal of an ownership position in a LLC for two fundamental reasons: (1) to provide certainty as to whether a member did or did not withdraw as required by several provisions of the LLCA, and (2) to protect an owner's property rights in a LLC from false claims of withdrawal. The Court of Appeals rewrite of the statute undermines bright-line rules of law that provide certainty over ownership status, it strips away the procedural protections that §509 was designed to provide for an owner's property rights in a LLC, and it introduces protracted litigation as a mechanism to determine ownership status.

Defendants also take issue with the terminology used in Mr. Altobelli's application referring to the Court of Appeals as adopting a principle of "implied withdrawal." Plaintiff used this terminology only as short-hand for describing any finding of voluntary withdrawal based on implication instead of compliance with a method of withdrawal described in an operating agreement. Defendants' theory that a member may withdraw his or her ownership in ways not provided in an operating agreement fails because §509(1) says the exact opposite. Section 509(1) provides that a member may withdraw "only as provided in an operating agreement."

Section 509 distinguishes between voluntary withdrawal, expulsion and events of automatic forfeiture that may be set out in an operating agreement. Section 509(1) uses the word "may" to indicate the discretion of a member to withdraw, and thus subsection (1) addresses voluntary withdrawal. Section 509(2), in contrast, addresses expulsion (involuntary

withdrawal) and events of automatic forfeiture of membership. By requiring compliance with a method of withdrawal in order to effectuate a voluntary withdrawal, §509(1) protects against false claims that a member voluntarily gave up his or her ownership rights in a LLC. It prevents members from picking and choosing events of automatic forfeiture that are not set out in an operating agreement as contemplated by 509(2), and it prevents members from picking and choosing when they need to follow expulsion procedures in order to cut off another member's ownership rights.

The Court of Appeals misunderstood the meaning of withdrawal in the context of LLC membership and §509. In this context, "withdraw" means giving up ownership rights in a LLC, *i.e.* giving up the right to participate in the profits and voting that comes with ownership in a LLC.

Mere assertions that a member is not fulfilling contributions or is violating an operating agreement does not equate to an owner withdrawing his or her right to participate in the benefits of ownership. Like the transfer of other property interests, section 509(1) requires that an owner may voluntarily withdraw only by a method provided in an operating agreement. If managers think that an owner is not adequately fulfilling obligations, they can seek to effectuate a withdrawal by a procedure in an operating agreement. If a member is unwilling to voluntarily withdraw, then the managers can try to expel the member.

In this case, defendants cannot justify their unauthorized conduct by falsely claiming Mr. Altobelli violated section 2.17 of the Agreement *after* they terminated his rights on July 31, 2010.[5] The Operating Agreement nowhere states that Mr. Altobelli could be *deemed* to have

5 Section 2.17 requires approval for service in a business entity, not temporary intern-like opportunities at a university not in competition with the firm. Mr. Altobelli accepted nominal pay only after his rights were cut off, and he continued to contribute to the firm throughout 2010.

automatically forfeited his ownership interest under these circumstances. Regardless, section 2.17 does not vest defendants with power to expel an owner by unilaterally declaring an implied withdrawal. In fact, defendants cannot expel any Principal, with the exception of International Principals, based on their own assessment that a Principal is not in "good standing." See Operating Agreement §2.8(C). If managers want to penalize any Principal with forfeiture of his ownership on the assertion that he is not fulfilling his obligations, they need to obtain a 2/3 supermajority vote of the owners.[6] Defendants had no right to dodge the owners and the only question here is did MCL 450.4509 allow defendants to usurp the power of the owners under the guise of implied withdrawal and cut off Mr. Altobelli's ownership rights on July 31, 2010.

II. DEFENDANTS' ARGUMENT THAT MR. ALTOBELLI'S INTERPRETATION OF §509(1) RESULTS IN AN ABSURDITY IS SERIOUSLY FLAWED.

The only other point made in defendants' response worthy of discussion is their claim that Mr. Altobelli's interpretation of §509(1) results in an absurdity under the facts of this case. Defendants label Mr. Altobelli's position in this case as "farfetched" because, according to them, under his interpretation of §509, "a Miller Canfield Principal could never withdraw from the firm other than through death." Defs' Brf., at 1. Thus, defendants suggest that if Mr. Altobelli's reading of §509(1) were correct, a person could not voluntarily withdraw an ownership interest even "if he left the practice, went to work for a competing law firm, or lost his license to practice law." Defs' Brf, at 1.[7] Several comments regarding this empty critique are in order.

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6 About 40% of the owners violated the Operating Agreement by failing to fulfill their contribution obligations in the 2010 evaluation year, including Hartmann himself who instead spent time vacationing in Europe while contributing 644 total hours less than Mr. Altobelli. No one suggests that the managers may unilaterally cut off the ownership rights of any of these Principals by declaring an implied withdrawal.

7 Defendants' MRPC 5.6 argument is completely misguided. MRPC 5.6 prevents a lawyer from making a partnership agreement that restricts the right of a lawyer to practice "after" termination of the relationship, not before termination of the relationship.

First, as discussed in Mr. Altobelli's initial brief, there is some dispute as to whether the pre-1997 or present version of §509 would control in this case. *See LaFontaine Sound, Inc. v Chrysler Group, LLC*, 496 Mich 26; 852 NW2d 78 (2014); *Kia Motors America, Inc. v Glassman Oldsmobile Saab Hyundi, Inc.*, 706 F.3d 733, 738 (6th Cir. 2013); *Williston on Contracts*, §30.23 (4th ed 1990) ("changes in the law subsequent to the execution of a contract are not deemed to become part of [the] agreement unless the language clearly indicates such to have been [the] intention of [the] parties.") Prior to its 1997 amendment, §509 allowed a member to voluntarily withdraw from a LLC by giving written notice 90 days in advance of the withdrawal. While this provision was written out of the statute in 1997, if the pre-1997 version of the statute is applicable, a Miller Canfield Principal could voluntarily withdraw by doing so in writing.[8]

If the post-1997 version of §509 applies in this case and the voluntary withdrawal of an ownership interest can be accomplished "only as provided in an operating agreement," defendants seek to cast Mr. Altobelli's position as anomalous. What is far more anomalous is that a law firm equipped with presumably dozens of competent attorneys did not see fit to react to the changes reflected in the 1997 amendments to the LLCA by amending its own Operating Agreement.

The rather basic point here is that, assuming the post-1997 version of §509 applies, what defendants seek to package as a bizarre result associated with Mr. Altobelli's legal position is, in actuality, a result occasioned by the failure of a respected law firm to respond to a change in the

[8]There is at least some indication that defendants themselves believed that the pre-1997 version of §509 controlled this case. The record reflects that when Hartmann sought to end Mr. Altobelli's ownership interest, he asked Mr. Altobelli to submit a written withdrawal. Mr. Altobelli refused and instead invoked his right to a vote of the owners on any attempt to terminate his ownership.

law pertaining to the governance of LLC's. The language of the Operating Agreement pertaining to voluntary withdrawal was never changed either because the firm's management believed that the pre-1997 version of §509 still applied or because someone was asleep at the wheel.

In any event, defendants' *reductio ad absurdum* fails of its own accord. The owners of Miller Canfield, with limited effort or thought, can amend their Operating Agreement at any time to respond, albeit belatedly, to the 1997 amendments to §509. They can easily avoid any "farfetched" results created by application of §509(1)'s literal text by prescribing a mechanism for voluntary withdrawal in the Operating Agreement. It is up to the owners of the firm to remedy this omission, not the Court.

Defendants further claim that if Mr. Altobelli's interpretation of §509 were actually adopted, the owners of Miller Canfield could never rid themselves of a Principal's ownership interest even if that Principal left the practice of law or went to work for another firm or lost his license to practice law. However, in these circumstances, the owners could simply employ the expulsion provision in their Operating Agreement to terminate that Principal's interest. Thus, if certain owners at Miller Canfield cannot get rid of a Principal through voluntary withdrawal, they have a mechanism in their Operating Agreement to terminate the ownership of that Principal.[9]

III. THE COURT OF APPEALS "CLARIFICATION" OF THE CONDUCT NECESSARY FOR VOLUNTARY WITHDRAWAL.

Mr. Altobelli also raised in his application a challenge to the Court of Appeals erroneous

[9]It was Mr. Altobelli who urged Hartmann and other firm managers to employ the expulsion provision of the Operating Agreement. Mr. Altobelli did so secure in knowing that a 2/3 supermajority of the Senior Principals would not vote to terminate his ownership interest. Defendants presumably knew the same thing and therefore they never invoked the Operating Agreement's expulsion procedures.

ruling "resolving" what it found to be an ambiguity in the Operating Agreement. *Klapp v United Ins Group Agency, Inc.*, 468 Mich 459, 469; 663 NW2d 447 (2003). Notably, defendants did not even address this issue and this aspect of the Court of Appeals decision represents clear error.

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